IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MERANIA M. MACHARIA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 99-3274 (CKK)**
	)	
UNITED STATES OF AMERICA.	)	
	)	
Defendant.	)	
	)	

MOTION TO DISMISS

The United States of America hereby moves that this Court dismiss plaintiffs' Amended Complaint for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), with respect to Counts One and Two, and for lack of subject matter jurisdiction and failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6), with respect to Counts Three and Count Four. A memorandum of support of this motion and a proposed order are attached.

Dated January 28, 2002.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

Plaintiffs allege claims against the United States of America arising from the terrorist bombing of the United States Embassy in Nairobi, Kenya on August 7, 1998– an attack against the United States, carried out on foreign soil, in which the United States was a victim. See generally Complaint (Compl). The United States is sensible of the pain and loss of the victims of this terrorists outrage, and cognizant of their frustration in trying to obtain redress here. Still, regardless of the facts of the attack, we respectfully submit that the Court has no jurisdiction over the subject matter of this law suit.

For reasons set forth more fully below, this lawsuit should be dismissed because it is barred by the doctrine of sovereign immunity, and because the only remedy that the law provides for alleged torts by the United States is the Federal Claims Tort Act ("FTCA"). 28 U.S.C. §2671 *et seq.* The FTCA expressly excludes torts committed on foreign soil and excepts "discretionary and political"decisions of the United States in the international arena. Despite being allowed

extensive discovery,[1] plaintiffs are unable to demonstrate that the acts or omissions about which they complain occurred in the United States– let alone in this jurisdiction. The argument for dismissal is set out more fully below. Moreover, plaintiffs cannot state a claim under international law and cannot establish that this Court would have jurisdiction over such a claim. Finally, there is no law to support plaintiffs' claim of a constructive trust. Plaintiffs' complaint, therefore, must be dismissed.

BACKGROUND

On August 7, 1998, without warning, terrorists exploded a bomb near an entrance to the United States Embassy in Nairobi, Kenya. Compl. ¶ 69. As a result of this explosion, twelve Americans and more than 200 Kenyan nationals were killed; many more were also injured. Id. Although some of the deaths and injuries were of persons inside the Embassy, the majority were outside its premises. See Compl. ¶ 71. Notably, plaintiffs admit that most of the Kenyan casualties resulted "from the collapse of the adjacent Ufundi Building" and from glass flying off "the nearby Co-op Bank Building." Id. Despite this admission, plaintiffs– all of whom were outside the Embassy– claim that the United States bears sole responsibility for their injuries.

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[1] In accordance with the Court's Orders of March 26, 2001, and October 3, 2001, plaintiffs were allowed to engage in extensive discovery by which defendant released more than 15,000 pages of documents and provided witnesses for deposition testimony. The transcripts of all depositions taken in accordance with the Court's March 26, Order were filed with Defendant's July 16, 2001 Notice of Filing and are incorporated herein by reference. Defendant submits these transcripts and certain other documents for the limited purpose of allowing the Court to determine whether it has jurisdiction to consider plaintiffs' claims. It is well-established that when a defendant challenges the substance of the jurisdictional allegations, as it does here, it may use extraneous evidence to test those allegations without converting the motion into a summary judgment motion. See Land v. Dollar, 330 U.S. 731, 735 n.4 (1947); Herbert v. National Academy of Sciences, 974 F.2d 192, 197-98 (D.C. Cir. 1992); Bonterra America, Inc. v. Bestmann, 907 F. Supp. 4, 5 n.5 (D. D.C. 1995); see also Holt v. United States, 46 F.3d 1000, 1002-03 (10th Cir. 1995).

Plaintiffs allege that the Embassy building was inherently dangerous, that the United States failed to warn them of a known terrorist threat, and that the United States failed to implement adequate security at the diplomatic post.[2] See Compl. Count One. As a result, they allege that the Embassy was a public nuisance. Id. Count Two. In addition, plaintiffs make a number of specific allegations concerning security at Embassy Nairobi as follows: 1) the United States failed to properly train its employees and its local guard contractors, Compl. ¶¶ 45, 52, 75; 2) that the physical security at the Embassy was deficient, Id ¶¶ 45, 68, 3) that Embassy operations were negligent, id at ¶¶ 53, 76 (equipment); ¶¶ 73, 74 (local guards); ¶ 53 (alarms); ¶ 54 (rear parking lot security); and, 4) that the United States failed to properly warn about a known hazard. Id. ¶¶ 46, 47, 57-62. In contrast to plaintiffs' allegations, the vast majority of decisions about how to secure Embassy Nairobi were made in Nairobi or were discretionary in nature, and decisions about how to train and supervise the local guards were delegated to an independent contractor.

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[2] Plaintiffs admit that the Department had approved several security measures to protect the Embassy. For example, in 1998 the Embassy installed new garage doors to improve security. Compl. ¶ 41. The facility was surrounded by a high, steel fence, and steel bollards restricted motorized access to the building. Id. ¶ 68. In fact, the Regional Security Officer in Nairobi from 1996-98, Patricia Hartnett Kelly, testified that Embassy Nairobi was "never turned down for [security upgrade] funds" when it requested such funds from Washington. June, 2001, Deposition of Patricia Kelly (Kelly1 Depo.) at 108:9-19. Plaintiffs also allege that guards were stationed at all entrances, and they refused entry to vehicles without proper authorization. Compl. ¶ 74. Despite these admissions, plaintiffs blame the United States for the bomb's damage.

A. Training.

Plaintiffs allege that the United States failed to train its employees properly. However, they simply cannot show that this training took place in the territorial United States. The Department provides security training to its employees stationed overseas, and others at foreign posts, through the Office of Training within the Office of Professional Development for the Bureau of Diplomatic Security. See June 2001, Deposition of David Haas (Haas1 Depo.) at 6. It does so, in part, by sending to each foreign post a Mobil Security Division Training Team. Id. at 8. A mobile training team visits each foreign post on a regular schedule to "bring security training and education to the employees there to create a safer platform for the conduct of foreign policy." Id. at 8-9. While on a visit to a particular post, the mobile training team provides training appropriate for the particular facts and circumstances present at each post -- something that is identified by the Regional Security Officer (RSO) located there. See id. at 10. Using a "collaborative process with the post that they will be visiting" the mobile training team develops a training curriculum and then delivers that training to Department employees, and perhaps local guards and others, at a particular foreign mission. Id. The post identifies the training course attendees. Haas1 Depo. at 15:18-16:8. Frequently, that includes "the American community at large, dependents, officers working at the embassy, marine security [guards], [and members of the] local guard force . . . .". Id. at 10. Consequently, decisions about what particular training is needed at a particular place are made by the RSO in that location based on the particular needs of the facility. See id. 67:19-21 (training team asks RSO for input as to what RSO wants the team to address). See also id. at at 18:8-10 ("Q. The RSO . . . would make the decision as to who would attend these training sessions, correct? A. Yes.").

A mobile training team visited Nairobi in 1997. Haas1 Depo. at 8. It provided training to the local guard forces (LGF), the Marine security guards (MSG), and other embassy employees. Defendant's Exhibit (Def. Ex.) 1 at 1963. Employees received training on defensive driving, rape awareness, preparation for carjackings, and "techniques to reduce vulnerability to criminal and/or terrorist activity" Id. at 1969. Moreover, the local guard training included "vehicle bomb search procedures" and dealing with "telephonic bomb threat response." Id. at 1970.

Additionally, the RSO in Nairobi often provided training to employees and contractors at the post. That training included instruction to local guards concerning vehicle bomb searches, Deposition of Patricia Hartnett-Kelly (Kelly1 Depo.) at 48:7-49:13, and monitoring local guards' compliance with that training. Id. at 55:17-56:15; 57:7-58:3. The RSO was also responsible for training guards on profiling potential threats, Haas1 Depo. at 36:6-14; 37:5-13, and the potential delivery of explosives by vehicles. Id. at 41:15-20; 42:14-43:6. Finally, the guard company, United International Investigative Services (UIIS), was responsible for training its employees. Kelly1 Depo. at 49:14-50:5.

In short, plaintiffs cannot demonstrate that any decisions about how to train Embassy employees or the local guard force were made in Washington.[3]

B. Physical Security.

The Department's Bureau of Diplomatic Security (DS) is responsible for implementing security programs "to provide a secure environment for the conduct of U.S. diplomacy and the promotion of U.S. interests worldwide." Def. Ex. 2, 12 FAM § 011. As part of this effort, DS

[3] Even if they could show that some of those decisions were made in the Office of Training, it is located in Dunn Loring, Virginia. Haas1 Depo. at 11.

chairs the Overseas Security Policy Board (OSPB), a board comprised of representatives from several agencies involved with foreign affairs, which develops, coordinates, and promotes "uniform policies, standards, and agreements on security operations outside the United States". Def. Ex. 2, 12 FAM § 022 & Exhibit 022 thereto. OSPB considers and uses risk management principles when developing the policies and standards. Def. Ex. 2, 12 § FAH-6 H-014, Exhibit H-014 (Scope of Operations).

The Department's physical security standards are contained in the Physical Security Handbook.[4] Def. Ex. 2, 12 FAH-5. The physical security standards are not absolute, and "may vary according to differing threat levels and mission of agency."[5] 12 FAM 022, Exhibit 022. See also 12 FAH-5 H-121.2 ("All DOS overseas facilities are to comply, as closely as possible, to the standards for physical security contained herein.") (emphasis added). In his June 2001, deposition, Mr. W. Ray Williams (Williams1 Depo.) described the standards as follows:

> We do have standards which are developed through interagency foreign affairs committees and working groups. They are guidelines, and they are by and large performance driven as opposed to prescriptive. In other words, they . . . tell you what it is you're trying to accomplish, not necessarily how to accomplish it.

Williams1 Depo. at 20:14-10. See also Deposition of Joseph D. Morton (Morton Depo.) 84:3 ("To the extent possible, [posts] try to meet the guidelines.").

Because each overseas facility operates under different circumstances, physical security systems are post-specific, and are tailored to the needs and local conditions of the individual

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[4] The Handbook incorporates the standards developed by the OSPB, 12 FAH-5 H-013(a), which are published in 12 FAH-6, the Security Standards Handbook. See Def. Ex. 2.

[5] Indeed, the Physical Security Standards Matrix demonstrates that each security standard does not apply to all posts. See Def. Ex. 2, 12 FAH-5 Appendix L.

installation. Def. Ex. 2, 12 FAH-5 H-024. Employees must consider the factors that effect the security of their facility, including its foreign policy "mission," id. at (1), its "[p]hysical constraints, including structural limitations," id. at (5), budget constraints, id. at (6), and the "likelihood of long-term changes in operations, relocation, retrenchment, and threat atmosphere." Id. at (8). See also Williams1 Depo. at 21:4-6 ("[the physical security standards] are invariably tailored to the individual facility, when it was constructed, what it is constructed of").

Existing office buildings (EOBs)[6] are not subject to the same standards as new or newly-acquired buildings. See Def. Ex. 2, 12 FAH-5 H-111. Importantly, EOBs are not required to have a 100 foot setback from the perimeter wall or fence. Id., 12 FAH-5 L.12.1, 12 FAH-5 L.22.1. See also id., 12 FAH-5 F.22.1, F.22.2 (EOBs not required to provide blast protection, even at a critical threat level). Rather, employees must attempt to apply the standards to EOBs "to the maximum extent feasible or practicable." Id., 12 FAM § 311.2 (a). See also 12 FAH-5 H-121.1 ("these standards will be applied to [EOBs] to the maximum extent feasible."). Feasibility depends on a multitude of factors, including legal constraints in a particular country, the practicality of upgrading a building to meet the standards, and the lack of a 100 foot setback. Def. Ex. 2, 12 FAH-5 H-121.1. Moreover, if an existing facility cannot meet standards, neither waivers, Def. Ex. 2, 12 FAM § 314.1(a), nor exceptions to standards, Id., 12 FAH-5 H-121.2, are required.

The security standards are directly linked to a threat level that is developed and assigned to each post. The Department ranks each facility twice yearly according to risk level. Def. Ex. 2,

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[6] EOBs are defined as "those already occupied by [the U.S. Government] or past the 35% design development stage prior to July 1991." Def. Ex. 2,12 FAH-5 H-111.

12 FAH-6 H-511.3(a); See also, infra, § 4. Threat Analysis. In 1998, DS had established four threat categories – political violence, human intelligence, technical intelligence, and crime. Def. Ex. 2, 12 FAH-6 H-012; see also Morton Depo. at 59:14-16, 61:13-17. Within each category, there are four threat levels – critical, high, medium, and low. Def. Ex. 2, 12 FAH-6 H-012. Once a threat level is assigned to a facility, the Department implements a risk management plan that assesses the value of the asset, the danger of specific threats, and the extent of vulnerability present in order to mitigate the vulnerability and, thus, the risk. Id., 12 FAH-6 H-511.3(a) & 511.4(b); Morton Depo. at 75:3-76:4. "A decision is then made as to what level of risk can be accepted and which countermeasures should be applied. Such a decision involves a cost-benefit analysis, giving decision makers the ability to weigh varying security risk levels against the cost of specific countermeasures." Def. Ex. 2, 12 FAH-6 H-511.4(b).

Because the construction of Embassy Nairobi was completed in 1980, it was an existing office building for the purpose of applying the physical security standards. See Def. Ex. 2, 12 FAH-5 H-111. Therefore, it was not subject to a number of standards, including those regarding minimum setback, that might apply to new or newly-acquired buildings. Id., 12 FAH-5 L.12.1 & 12 FAH-5 L.22.1. And, in 1998, the Nairobi Embassy had a medium threat level for political violence, Morton Depo. at 71:13-14, and a critical threat level for crime. Kelly1 Depo. at 56:19-20. Despite its critical crime rating, and even if it had been rated as critical for political violence, it did not have to meet the minimum setback standard because it was simply not feasible at that location. Def. Ex. 2, 12 FAH-5 L.22.1 & H-121.1. See also Compl. ¶ 68.

C. Embassy Nairobi Operations.

Plaintiffs make a myriad of allegations about the Embassy Nairobi's operations, all of which occurred in Kenya. Additionally, the vast majority of these allegations were beyond the scope of the Department's control.

Plaintiffs allege that the local guards were unarmed. Compl. ¶ 74. Yet, the Government of Kenya would not allow local guards to carry arms. Kelly1 Depo. at 107:16-20. Plaintiffs complain that the guards were unable to warn the building's occupants of the terrorists' presence. Compl. ¶ 74. While all embassy employees carried hand-held radios to facilitate communications in the case of an emergency, Kelly1 Depo. at 24, the Government of Kenyan would not grant the Embassy use of an additional frequency. Id. at 108:2-8. Plaintiffs further allege that the United States failed to secure the Embassy's rear parking lot – where the truck bomb exploded on August 7, 1998. See Compl. ¶ 54; 73. That parking lot was not owned or controlled by the United States.

> The [rear] parking area . . . was owned by the Kenyans. The Kenyan Cooperative Bank was there. They controlled that parking lot.
>
> Q. Did traffic for the Kenyan Cooperative Bank use that lot as well?
>
> A. That's right, that's what I'm saying. . . We had a very limited number of [parking] spaces which the bank allowed us to have against their best wishes. They did not want to give us and were continually aggravated with our efforts to obtain control of that parking lot.

Kelly1 Depo at 42:13-43:8. Additionally, the Kenyan local police, who have responsibility for protecting the Embassy pursuant to the Vienna Convention, Morton Depo. at 55: 8-10, were often unable to provide security services. See Compl. ¶ 44; Kelly1 Depo. at 88. And, certain security measures were considered by Department employees for use in Nairobi but rejected

because they were not feasible given the existing structure or could have caused more harm than benefit. Kelly1 Depo. at 110 (RSO's suggestion that the Department build a wall around the Embassy perimeter was rejected because "in the event of an explosion outside, it would send the explosion into the interior and do more damage" to the building and its occupants).[7]

Although plaintiffs allege that the local guards were improperly trained and supervised, they recognize that the guards did their job on the day of the bombing. See Compl. ¶ 74. When the terrorists arrived at the rear parking lot – an area outside of the control of the United States, Kelly1 Depo. at 43, – the local guards barred their entry to the Embassy compound. Compl. ¶ 74. Consequently, the bomb exploded on territory under the control and responsibility of the Government of Kenya. Kelly1 Depo. at 52.

In short, plaintiffs raise no issue about the security operations of Embassy Nairobi that were under the control of the United States, that the post did not address in Kenya, see Williams1 Depo. at 10:12-20; 46:20-47:16, or that could have mitigated the bomb's terrible effects.

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[7] Additionally, each foreign post has in place an emergency action plan. See Compl. ¶ 49. These are developed by committees established at each post based on the particularized needs of that facility. See Deposition of Lou Possanza (Possanza Depo.) at 21:2-4; 24:3-24. The Department has an emergency planning handbook that provides guidelines for each post to use when developing its emergency action plan. Id. at 54:9-18 (emergency action plan is based upon emergency planning handbook and conditions at post). See also Williams1 Depo. at 31:17-32:9 (Department provides general guidance to posts regarding emergency action plans, but the plans are developed at post, and are post-specific). Once a plan is developed, it is sent to DS in Washington so that it may be reviewed, approved, and distributed to other agencies that might have employees working in the overseas facility. See Possanza Depo. at 51-52. Accordingly, the Nairobi Embassy developed an emergency action plan for employees, including local guards, to follow in the event of an emergency. Kelly1Depo. at 78:12-21; 83:3.

D. Threat Analysis

Plaintiffs allege that the Department knew or should have known in advance about the terrorists' plans to attack the Embassy. Compl. ¶ 56. And, they allege that the United States's failure to advise, inform, or to disclose to them the "seriousness of the threat" was negligent. Id. at ¶ 58. The Department receives, analyzes, and manages threat information in a number of different ways. First, foreign facilities often receive information about particular threats to their buildings or employees and address those threats locally. See Kelly1 Depo. at 76: 2-4. Second, the Office of Intelligence and Threat Analysis (ITA) within DS receives information from a variety of sources and assesses "threats against [the Department's] facilities overseas." Morton Depo. at 58: 18-19. ITA then communicates this information to the post on a daily basis so that the post may take appropriate action. Morton Depo. at 73:19-20; 76: 4. Finally, other agencies may obtain or develop information about potential threats to Departmental facilities overseas, and those agencies are then responsible for sending that information to the post. Id. at 81:4-6.

Additionally, ITA compiles the "composite threat list (CTL)". Id. at 61:15. When doing so, ITA receives the "input of post . . . along with all source information and [it] check[s] with various different intelligence agencies to determine a threat level." Id. at 63. Once developed, the CTL is sent to each diplomatic post twice a year. Morton Depo. at 71: 20-21. With that rating, post employees assess particular dangers, confer with the Foreign Affairs Handbook, and determine what particular steps – if any – to take to reduce their vulnerability and risk. Morton Depo. at 66:7-12; 75:10-21. During that process, employees at overseas posts may consult with employees in Washington to determine how to respond to particular threats. Id. at 84: 6-7.

However, the Department does not have any requirements that headquarters' employees must follow in response to particular threat information. See id. at 83:19.

E. Local Guard Supervision.

Pursuant to a statutory directive, the Department is responsible for the "establishment and operation of local guard services." 22 U.S.C. § 4804(2)(D). Almost all aspects of the local guard program, from negotiating a specific contract to operational matters, are handled at foreign posts.

The Department provides local guard services through contracts with various United States companies. Morton Depo. at 10. Those contracts are negotiated between the Department's contracting officer and the contractor – negotiations that take place at the particular foreign post to which the contract applies. Id. at 12:9-17; 15:1-12; 17:19-20. See also Williams1 Depo. 7:18-8:5 (post solicits bid and decides on company; DS only provides general parameters for contract). Embassy Nairobi entered into a contract with UIIS, an American guard company, for provision of local guard services in 1996. Def. Ex. 3. The contracting officer was identified as an individual located in Nairobi. Id. at 7476.

The contract provided that UIIS was responsible for "maintain[ing] satisfactory standards of employee competency, conduct, cleanliness, appearance and integrity and [was] responsible for taking such disciplinary action with respect to employees as may be necessary." Def. Ex. 3 at 7495. UIIS assumed responsibility for, *inter alia*, "basic training, firearms qualification, [and] annual recertification training." Id. at 7498. The basic training program included instruction on "terrorism and criminality," "mission emergency plans," and "access control equipment used and procedures." Id. at 7498-99. The local guards' authority to make arrests and detain individuals was "defined by host country law." Id. at 7500. UIIS hired managers who were responsible for

"administer[ing] the security force training program." Id. at 7546. Indeed, the Embassy delegated to UIIS responsibility for training its employees, see id. at 7546-50, and UIIS required individual guards to "perform[] access control duties," "physically examine[] visitors and their possessions to detect the presence of . . . weapons," and to "perform[] package, vehicle, and limited inspections of individuals." Def. Ex. 3 at 7551.

UIIS performed all of these functions in Nairobi. The local guards were Kenyan citizens hired and supervised by UIIS. Kelly1 Depo. at 35:11-19. Any guidance that the Department provided to UIIS regarding the guards' qualifications came from the RSO and her subordinates at post. Id. at 36:16-37:10. And, the Embassy prepared "guard orders" that contained standards for local guards to follow. Id. at 83:12-84:19. All of these procedures insured that the local guards adequately performed their duties at Embassy Nairobi. See Compl. ¶ 74.

These facts demonstrate that almost all of the acts or omissions about which plaintiffs complain occurred in Kenya, and those that occurred in Washington were clearly discretionary in nature. As will be shown below, this Court does not have subject matter jurisdiction over plaintiffs tort claims because those claims arose in a foreign country. 28 U.S.C. § 2680(k). This Court does not have jurisdiction over this case to the extent that plaintiffs complain about the actions of security guards working for an independent contractor. Id. § 2671. And, to the extent that plaintiffs claim they were harmed by decisions made in Washington D.C., those decisions were both discretionary and political – depriving this Court of jurisdiction over those claims as well. Id. § 2680(a). Consequently, this Court should dismiss the Amended Complaint in its entirety with prejudice.

ARGUMENT

I. PLAINTIFFS' CLAIMS UNDER COUNTS ONE AND TWO ARE BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY

The doctrine of sovereign immunity bars plaintiffs' claims in Counts One and Two. Congress provided for a limited waiver of Sovereign Immunity through the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq*. It is undisputed here that the FTCA is the exclusive remedy for tort claims arising from negligent or wrongful acts or omissions of federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b). Thus, the statute contains express exceptions to the waiver, and, where such an exception applies, the Court is without subject matter jurisdiction. Cope v. Scott, 45 F.3d 445, 448 (D.C.Cir. 1995).

A. Claims Arising in Foreign Countries Are Exempt from The Federal Tort Claims Act

This Court lacks jurisdiction in this case because Congress provided an exception for claims "arising in a foreign country." 28 U.S.C. § 2680(k). As plaintiffs claims arise in Kenya, the foreign country exception applies to bar the Court's review. The Supreme Court analyzed the foreign country exemption in United States v. Spelar, 338 U.S. 217 (1949). There, the Court held that the language of the statute was plain-- the term "foreign country" denotes "territory subject to the sovereignty of another nation." Id. at 219. The FTCA's legislative history makes clear that Congress enacted the exception because the Act bases liability on the law of the situs of the wrongful act or omission. Id. at 221; 28 U.S.C. § 1346(b)(1). Without such an exception, the United States would be subject to liability according to the law of foreign nations -- something Congress expressly sought to avoid. Id.; see also Meredith v. United States, 330 F.2d 9 (9th Cir.), *cert. denied*, 379 U.S. 867 (1964). Indeed, the phrase "foreign country" must "be read to

include ... embassy buildings and grounds or liability of the United States for acts of its employees will be determined by the law of a foreign power, contrary to the purpose of Congress." Id. at 10. As a result, "torts occurring on American embassies or military bases which are located in foreign countries are barred by the foreign country exception." Beattie v. United States, 756 F.2d 91, 96 (D.C. Cir. 1984), *citing* Spelar, 338 U.S. 217; see also Smith v. United States, 507 U.S. 197 (1993); Broadnax v. United States, 710 F.2d 865 (D.C. Cir. 1983).

Here, plaintiffs complain about a terrorist bombing that took place near the rear entrance to the United States Embassy in Kenya. Compl. ¶ 69. They claim they were harmed because of specific acts of alleged negligence that occurred in Kenya. For example, they complain that "personnel inside the Nairobi Embassy, and embassy guards, were not trained to react properly to [bomb] attacks." Id. ¶ 52. To the extent that the training allegedly should have been given to foreign national Embassy employees and local guards, it could only have taken place in Nairobi. Plaintiffs complain that the "perimeter guards at the Nairobi Embassy had not been provided with appropriate equipment." Id. ¶ 53. Any such equipment would have been provided in Kenya. And, plaintiffs allege that the Department failed to "obtain more control over the rear parking lot" to the Nairobi facility. Id. ¶ 54. Of course, any effort to control the rear parking lot would have been made in Kenya. Similarly, plaintiffs allege that the United States failed to warn Kenyan citizens about the threat of terrorist attacks. Compl. ¶ 47, 55-62. Those warnings, by their very nature, could only have taken place in Kenya. And, they complain that the United

States "took and maintained complete and exclusive control over the Embassy Compound" immediately after the bombing. Compl. ¶ 77. That action also occurred solely in Nairobi.[8]

Similarly, the language of the negligence count itself shows why the foreign country exception bars plaintiffs' claims. They allege that Embassy Nairobi was "inherently dangerous" and that the United States "failed to exercise, due, ordinary and prudent care with respect to security *at the Nairobi Embassy*." Compl. ¶¶ 83, 86 (emphasis added). Yet, nowhere does the complaint set out the law that establishes that standard of care. See id. As the Ninth Circuit noted in Meredith, federal courts are not required to "create rules governing liability for tortious acts and omissions on the premises of American embassies and consulates abroad ... and obviously our embassy at Bangkok has no tort law of its own." 330 F.2d at 10 (citations omitted). Likewise, Embassy Nairobi has no tort law of its own. Thus, the Supreme Court's rationale for proscribing negligence cases that arise on foreign soil is equally applicable here. See Spelar, 338 U.S. at 219-221. Moreover, Article 22 of the Vienna Convention on Diplomatic Relations, Defendant's Exhibit (Def. Ex.) 4, establishes that "the receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage." As a result, to the extent that there is any duty to provide security at diplomatic missions abroad, that duty falls on the host country.[9] See Williams1 Depo. 27:10-14 ("One thing you have to keep in mind, our first response [to a funding request], many times, is refer to the Vienna Convention. The responsibility for the protection of that facility, personnel

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[8] The complaint repeatedly confirms that the acts or omission at issue took place on foreign soil. See generally Compl.

[9] Even if the law of this jurisdiction applied in Kenya, plaintiff cannot identify any local tort law placing on landowners a duty to protect passersby or neighbors.

and assets rests with the host government."); Morton Depo. 55:8-10 ("The host country has a responsibility under the Vienna Convention to provide for our protection.").

Indeed, diplomatic facilities abroad exist in a variety of different circumstances and face a variety of different threats. See e.g. Williams1 Depo. at 26:19-21 ("You have different types of risk. You have a risk in Moscow that is different than the risk in Beirut."); Morton Depo. at 41:20-21 ("Local guard programs vary from post to post."); Haas1 Depo. at 31:13-16 ("That again is contingent on the post. At some posts you have metal sally ports. . . . At other posts you do not."); Possanza Depo. at 25:3-4 (emergency action plans developed regularly "depend[ing] on the threat rating for the post."). As a result, the Department delegates to its posts responsibility for determining what particular measures should be taken in response to those circumstances and threats. See id. Those decisions might be made in consultation with employees in Washington, see Morton Depo. at 84:7; Williams1 Depo. at 8:12-13, but in no circumstance does an employee in Washington dictate to an employee stationed overseas what particular steps to take with respect to diplomatic security. See Williams1 Depo. at 8:17 ("that's their call").

For all these reasons, this Court is without jurisdiction to hear plaintiffs' negligence claims, and Counts One and Two should be dismissed.

B. The FTCA Exempts From Its Scope Discretionary Actions

Plaintiffs' complaints about acts or omissions of federal employees on United States soil, based on so-called "headquarters claims" are also barred.[10] This is because another exception to

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[10] The Court of Appeals discussed "headquarters claims" in Beattie. 756 F.2d at 96. Under a "headquarters" theory, a plaintiff may complain about an injury that occurred on foreign soil that had (continued...)

the Congressionally mandated waiver of sovereign immunity provided for in the FTCA applies to acts arising out of "discretionary functions." This exception preserves the sovereign immunity of the United States in

> [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). "'Where there is room for policy judgment and decision, there is discretion' which the United States may exercise or even abuse without incurring tort liability." Beckford v. United States, 950 F. Supp. 4, 9 (D.D.C. 1997), *quoting* Dalehite v. United States, 346 U.S. 15, 36 (1953).

The discretionary function exception is among the most important provisions enacted by Congress "to protect the Government from liability that would seriously handicap efficient government operations." United States v. Muniz, 374 U.S. 150, 163 (1963). Its purpose is to encourage "the executive . . . to act to [his] judgment of the best course," Dalehite, 346 U.S. at 34, without fear of "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 814, *reh'g denied*, 468 U.S. 1226 (1984)(*hereinafter* Varig Airlines).

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[10](...continued)
its origins in acts or omissions taken in the United States. Those claims, however, are difficult to establish. MacCaskill v. United States, 834 F.Supp. 14, 17 (D.D.C. 1993), *aff'd* 24 F.3d 1464 (D.C. Cir. 1994)(table) (headquarters' personnel must "closely monitor and control events surrounding" the claim that arose overseas to establish a headquarters claim.)

In order to determine whether the discretionary function exception applies, a district court must engage in a two-tiered analysis. The court must first decide "whether any 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'" Cope v. Scott, 45 F.3d at 448, *citing* United States v. Gaubert, 499 U.S. 315, 322 (1991); see also Hughes v. United States, 110 F.3d 765, 768 (11th Cir. 1997); Powers v. United States, 996 F.2d 1121 (11th Cir. 1993); Baum v. United States, 986 F.2d 716, 720 (4th Cir. 1993) ("[t]he inquiry boils down to whether the government conduct is the subject of any mandatory federal statute, regulation, or policy prescribing a specific course of action").[11] Specifically, a court must first consider whether the complained-of conduct "is a matter of choice for the acting employee." Domme v. United States, 61 F.3d 787, 789 (10th Cir. 1995), *citing* Berkovitz v. United States, 486 U.S. 531, 536 (1988). "Conduct that does not involve an element of judgment or choice on the part of the government employee cannot be discretionary conduct." Id.

Secondly, the court must decide "whether the judgment afforded [government employees] regarding [the challenged acts] is the type of judgment that the discretionary function exception was designed to shield, here, [the courts] focus on whether the challenged actions are 'susceptible to policy analysis.'" Hughes, 110 F.3d at 768 (citation omitted); see also Cope v. Scott, 45 F.3d at 448. "[F]ocus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and whether they are susceptible to policy analysis." Gaubert, 499 U.S. at 326; see also Phoenix

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[11] "[W]hen a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply." Berkovitz v. United States, 486 U.S. 531, 544 (1988). Plaintiff bears the burden of identifying with specificity any such charge or directive that defendant has allegedly violated. ALX El Dorado, Inc. v. United States, 36 F.3d 409, 411 (5th Cir. 1994). Plaintiffs cannot do so here because no such directive exists.

Baptist Hospital v. United States, 937 F.2d 452 (9th Cir. 1991) (regulations allowed but did not mandate agency officials to hold compliance hearing; failing to do so presumed discretionary regardless of whether decision was result of negligent default).

The Supreme Court has rejected analyzing the applicability of the exception in terms of whether the government employee's actions were undertaken at an operational, versus planning, level. Gaubert, 499 U.S. at 326. "A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy making or planning functions." Id.; see also Tracor/MBA, Inc. V. United States, 933 F.2d 663, 667 (8th Cir. 1991). Thus, "[the court's] concern under the discretionary function exception is not whether the allegations of negligence are true; instead, [the court's] concern is whether the nature of the conduct involves judgment or choice and whether that judgment is of the kind that the exception was designed to protect." Hughes, 110 F.3d at 768 n.1 (citations omitted). Indeed, the United States is shielded from liability even if the complained-of conduct is negligent. See Gaubert, 499 U.S. at 323, *citing* Varig Airlines, 467 U.S. at 820.

The Court of Appeals recently applied the discretionary function exception in Sloan v. U.S. Department of Housing and Urban Development, 236 F.3d 756 (D.C. Cir. 2001). There, two subcontractors receiving funds through a HUD grant were investigated, suspended, and debarred from future HUD contracts. Id. at 758-59. After an Administrative Law Judge ruled in favor of the contractors, they sued the United States for money damages under the FTCA. Id. at 759. The Court of Appeals concluded that HUD's investigation and suspension of the contractors were discretionary in nature. First, the agency's regulations contained an "express delegation of discretion to the suspending official," consequently, "it must be presumed that the agent's acts are

grounded in policy when exercising that discretion." Id. at 761, *citing* Gaubert, 499 U.S. at 324. Second, "the sifting of evidence, the weighing of its significance, and the myriad other decisions made" by the agency "plainly involve elements of judgment and choice. That the conduct at issue here was undertaken by investigators and auditors rather than by Assistant Secretaries is irrelevant." Id. at 762. Moreover, government auditing standards "leave ample room for the exercise of professional judgment." Id. at 763.

Likewise, this Court, Judge Harris presiding, rejected a plaintiff's claims against the United States based on the actions of United States Armed Forces during and immediately after the invasion of Panama. Industria Pacificadora, S.A. v. United States, 763 F.Supp. 1154, 1155 (D.D.C. 1991). Plaintiffs challenged "Executive Branch decisions concerning the numbers of military personnel to be utilized, their deployment, and the kinds of orders that should be issued in furtherance thereof." Id. at 1158. Judge Harris held that the "discretionary function exception is clearly applicable" because such decisions are "grounded in political, military, and foreign policy considerations." Id. The Court rejected plaintiff's attempt to distinguish "operational" decisions and those made by "high officials" in Washington. Id. at 158-59. See also Mihaykov v. United States, 70 F.Supp. 2d 4, 5 (D.D.C. 1999)(discretionary function exception shields the United States from liability concerning decisions about foreign chancery security), *reversed on other grounds* Ignatiev v. United States, 238 F.3d 464, 467 (D.C. Cir. 2001) (allowing jurisdictional discovery into existence of mandatory directives concerning embassy security provided in Washington, D.C.). Indeed, the Supreme Court has held that decisions about the design of military equipment is "assuredly a discretionary function." Boyle v. United Technologies Corp., 487 U. S. 500, 511 (1987). These types of decisions require "balancing of

many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." Id. As such, those actions resemble the type of decisions to the court deemed discretionary in Dalehite – decisions "establishing plans, specifications or schedules of operations." 346 U.S. at 36. The same may be said of decisions concerning embassy facilities.

1. No Mandate Binds the Department's Employees.

Under the first prong of the discretionary function test the court must determine whether the Department's employees are bound to a particular course of conduct by a statutory or regulatory mandate. Congress enacted the Foreign Building Security Act to govern the Department's decisions concerning foreign facilities. 22 U.S.C. § 292. That statute provides

> the Secretary of State is empowered to acquire by purchase or construction in the manner hereinafter provided, within the limits of appropriations made to carry out this chapter, or by exchange, in whole or in part, of any building or grounds of the United States in foreign countries and under the jurisdiction and control of the Secretary of State, sites and buildings in foreign capitals in other foreign cities, and to alter, repair, and furnish such buildings for the use of the diplomatic and consular establishments of the United States. Id.

Congress also enacted the Omnibus Diplomatic Security and Antiterrorism Act. 22 U.S.C. § 4801 (1990). That statute vests in the Secretary authority to

> develop and implement . . . policies and programs, including funding levels and standards, to provide for the security of United States Government operations of a diplomatic nature and foreign government operations of the diplomatic nature in the United States. Id.

As these statutes makes clear, Congress has given the Secretary and her Department wide latitude to decide which steps are necessary to secure diplomatic facilities abroad. Neither of these statutes mandates a specific course of conduct.

Not only do Departmental regulations and procedures fail to mandate specific actions with respect to the purchasing, building, maintenance, or security of facilities, the regulations *prescribe* discretionary conduct. See Def. Ex. 2, 12 FAH- 6 Part 500. Departmental staff must perform an

> assessment of the value of the assets, the degree of a specific type of threat, and extent of the vulnerability. . . . A decision is then made as to what level of risk can be accepted and which countermeasures should be applied. Such a decision involves a cost-benefit analysis, giving decision makers the ability to weigh varying security risk levels against the cost of specific countermeasures.

Id., 12 FAH-6 H-511.4(b). Security standards apply based on feasibility. Employees must assess feasibility based on "the structural, electrical, and mechanical limitations of the building . . . [the] [z]oning laws and similar ordinances of the host country. . . [and] the cost of installing all of the necessary security features." Id., 12 FAH-5 H-121.1. Then, "the net gain in security over existing conditions must be weighed against the threat and the cost." Id. at (3).

As such, these standards resemble the regulations that the Court of Appeals examined in Sloan, 236 F.3d 756. There, regulations required employees to take actions once certain conditions had been met. Id. at 760. "Determining whether those broadly stated conditions exist involves substantial elements of judgment." Id. The same can be said here. The guidelines contained in the FAH and the FAM require employees to tailor their actions to the conditions present at a particular post. See Def. Ex. 2, 12 FAH-6 § 511.4(b) ("A decision is then made as to what level of risk can be accepted and which countermeasures should be applied. Such a decision involves a cost-benefit analysis, giving decision makers the ability to weigh varying security risk levels against the cost of specific countermeasures.") See also Williams1 Depo. at 20:14-20 (Standards "are invariably tailored to the individual facility when it was constructed,

what it is constructed of. [And,] [t]he availability of funds, which are weighed against a worldwide requirement."). Therefore, the security standards simply cannot be considered mandatory in nature. See Sloan, 236 F.3d at 761. They require the Department's officials to make decisions that involve judgment and choice. See Dalehite, 346 U.S. at 35-36. Therefore, this Court can easily conclude that the types of actions about which plaintiffs complain meet the first prong of the discretionary function test.

2. All of the Decisions at Issue Involve Political, Social, or Economic Policy Choices

In the second step of the analysis, this Court must evaluate whether the allegedly negligent decisions "are susceptible to policy analysis." Gaubert, 499 U.S. at 326. Plaintiffs complain about three types of decisions: where to locate the Embassy, Compl. ¶¶ 83-85; whether to warn the local public about suspected terrorist actions, Compl. ¶ 91; and how to best secure the Embassy's premises. Compl. ¶¶ 88-90. These are just the types of policy decisions that Congress intended to shield from judicial second-guessing. Varig Airlines, 467 U.S. at 814.

The decision about where to locate the Embassy is one firmly vested in the Secretary's discretion. See 22 U.S.C. § 292. Moreover, the Foreign Building Security Act requires that the Secretary make decisions within budgetary constraints imposed by Congressional appropriations. Id. As a result, the statute requires that the Secretary balance competing priorities – including budget limitations, safe, secure, and well-designed embassy facilities, and foreign relations concerns. Those considerations are especially important where older buildings, like the Nairobi Embassy, are involved. See Compl ¶ 68. As Departmental policies recognize, the cost of upgrading older buildings can often exceed the cost of constructing a completely new facility.

Def. Ex. 2, 12 FAH-5 H-121.11,1(3). Because decisions about whether to purchase or construct a new building or renovate an existing one are grounded in economic and political judgment, they are exempt from judicial review. 28 U.S.C. § 2680(a); see also National Union Fire Insurance v. United States, 115 F.3d 1415, 1422 (9th Cir. 1997), *cert. denied*, 522 U.S. 1116 (1998) (where a statute "requires the government to balance expense against other desiderata, then considering the cost of greater safety is a discretionary function."). See also Williams1 Depo. 21:13-23:6 and 25:13-27:10.

Discovery in this case made clear that the Department's decisions concerning overseas facilities' security are firmly grounded in economic and policy judgments. At his deposition, Mr. Williams described the way in which the Department makes decisions concerning funding of particular security requests from foreign posts. The "[p]hysical Security Division . . . reviews funding for appropriateness for prioritization and whether or not . . . [a request] makes sense from a security perspective . . . ." Williams1 Depo. at 13:5-9. Thus, it plays an advisory role regarding financial planning for new buildings, works with Congress in approving a building plan, and assists the Department in deciding how to allocate money for a variety of building security projects. See id. at 14:21-15:17. When allocating funds for security projects

> posts submit budgets for local operating expenses. . . . And in conjunction with the geographic bureaus, in conjunction with [Foreign Building Operations], we will develop our budget, what we think is necessary to meet global needs in terms of what's realistic, and that in turn is sent to the central financial planning portion of the Department, which then makes its own judgments on how valid they see these requirements [to] be.
>
> They in turn will work with OMB, who certainly have their opinions. It is then eventually submitted to Congress, which reviews it, both chambers, and a compromise is made. The money comes back to the central system of the

> Department and then is provided back out, some of the money, line item, other monies not. . .
>
> So what you are looking at is, has a lot of starts and stops through the system. We do not submit a budget based on what a given embassy comes in and talks about. The bureau . . . also has its program plan and where it plans on concentrating based on what monies have been provided by Congress say in the previous year, previous two years.
>
> So we may concentrate for a period of time on one type of security concern on a global basis and then move to the next phase, which may be something entirely different.

Williams1 Depo. at 21:13-23:6.

Likewise, the Department must carefully assess requests from posts for new embassy and chancery buildings, weigh those requests against others, and determine whether a new building would meet the United States's foreign policy objectives. See Compl. ¶¶ 33, 34, 38.

> If an embassy comes in and states we just had an earthquake and the building fell down, we are going to have to figure out where that money is going to come from to put them back in operation. On the other hand, you also have to figure out what isn't going to be done. . . . [Foreign Building Operations] has about five million dollars to look at the world on an annual basis.
>
> So the merits are important, but it has to be reviewed in a global perspective against other embassies with similar or more acute requirements.
> . . .
> The higher the threat level, the more attention will be paid to that request. The urgency of the request will also be taken into consideration. The cost benefit will be taken into consideration. Some things cost a tremendous amount of money and add very little value.
>
> There are also considerations in terms of what other measures can be taken to alleviate the threat or reduce [the threat.]

Williams1 Depo. 25:18-27:10. These reviews of funding requests and prioritization among Departmental foreign policy goals go to the heart of the discretionary function exception.[12] See Panificadora, 763 F.Supp. at 1159.

Similarly, plaintiffs complain that the Central Intelligence Agency "investigated no fewer than three terrorist threats" in Kenya in 1997, Compl. ¶ 29, yet "refused to notify employees, agents or officials responsible for operational security of the seriousness of the threat." Id. ¶ 47. Decisions about when, where, and to whom to provide intelligence data can only be considered the most discretionary of all governmental functions. See Frigard v. United States, 862 F.2d 201, 203 (9th Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989) (decisions concerning intelligence gathering and dissemination of intelligence information are inherently discretionary). A decision about "how much weight to give [intelligence] evidence is discretionary, the decision whether to credit this evidence, and to what degree, falls under the discretionary function exception." Hart v. United States, 894 F.2d 1539, 1547 n. 9 (11th Cir. 1990), *citing* CIA v. Sims, 471 U.S. 159, 176 (1985). Indeed, after a complete review of the actions of United States employees after the bombing, the Accountability Review Board determined that "[t]here was no credible intelligence that provided immediate or tactical warning of the August 7 bombings." Def. Ex. 6 at 4 ¶ 4.

The same can be said about decisions that do not involve intelligence data or national security. The Court of Appeals has held that an agency's decision not to warn the domestic

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[12] Indeed, an electronic mail message that plaintiffs will undoubtedly cite demonstrates the discretionary nature of the Department's decision not to build a new embassy in Nairobi. Def. Ex. 5. There, two employees discuss the fact that the Ambassador to Kenya has requested a new building and the difficulties in obtaining funds for such a project. The author notes that "construction/NOB [new office buildings]" are "priority issues" and that minor projects or upgrades might "lessen the Chancery's vulnerabilities." Id.

public about a potential pollution hazard was discretionary because it was based on policy considerations and took social and political factors into account. Wells v. United States, 851 F.2d 1471, 1477 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). Here, plaintiffs assert that governmental employees should have received alleged intelligence data, determined that it was accurate, and decided to issue a warning to the general public in a foreign country. As the Eleventh Circuit recognized in Hart and our Circuit recognized in Wells, these are just the types of decisions that are rooted in policy and that are protected from judicial second guessing.[13] See Varig Airlines, 467 U.S. at 814.

Likewise, plaintiffs assert that the Department failed to provide adequate security at the Embassy building. For example, they allege that the Department approved funds for "new security measures" in Nairobi, id. ¶ 41, yet only installed a garage door. Id. ¶ 42. However, courts have recognized that decisions about how to spend limited money -- especially when those decisions involve weighing competing policy objectives, plans, or specifications -- are quintessentially discretionary. National Union Fire,115 F.3d at 1419 (weighing against other factors "the cost of greater safety is a discretionary function."); Zielinski v. United States, 89 F.3d 831 (4th Cir. 1996) (table), 1996 WL 329492 ("security decisions are grounded in economic, social and political considerations" including resources and manpower, functioning of the facility, impact of security measures on facility atmosphere and local sensibilities); Fanoele v.

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[13] Additionally, the FTCA provides that the government is liable in the same manner and to the same extent as a private individual. 28 U.S.C. 1346(b)(1). Yet, plaintiffs' failure to warn allegation concerns international intelligence gathering activities. However, "no private individual can lawfully engage in international government intelligence involving the national welfare." Doe v. United States, 58 F.3d 494, 501-02 (9th Cir. 1995); see also Akutowicz v. United States, 859 F.2d 1122, 1125-26 (2d Cir. 1988). Therefore, there is no private analog for liability, and the FTCA cannot apply to the failure to warn claim.

United States, 975 F.Supp. 1394, 1401 (D. Kan. 1997) ("Decisions involving the scope of security protection at federal buildings generally are grounded in economic, social, and political considerations") (internal quotation omitted).

As the Department's risk management policies make clear, agency officials must consider the nature and timing of particular proposed improvements and weigh those against particular threat levels. Def. Ex. 2, 12 FAH-6 511.4(b). Those decisions clearly require the Department to "establish priorities for the accomplishments of its policy objectives by balancing the objectives sought . . . against such practical considerations as staffing and funding." Varig Airlines, 467 U.S. at 820. Indeed, decisions about foreign embassies, particularly their location and structure, inherently require agency officials to take policy objectives into account. These decisions require consultation and negotiations with the host country – actions that, by their very nature, affect foreign relations. See Panificadora, 763 F. Supp. at 1158-59 (decisions made while planning military actions are inherently discretionary). Moreover, plaintiffs acknowledge that Department officials allotted $3 million for building improvements at the Nairobi facility, and that officials had to make decisions about how to spend that money. Id. ¶ 43. The fact that hindsight may have improved those decisions does not change their discretionary nature. See Allen v. United States, 816 F.2d 1417, 1424 (10th Cir. 1987) (case asserting that "the government could have made better plans" fails). See also Williams1 Depo. 21:13-23:6; 25:13-27:10.

Because plaintiffs complain that the Department failed to relocate the Embassy, failed to warn them about the potential threat, and failed to use more resources to secure the building, they

complain about nothing more than discretionary decisions that are beyond the jurisdiction of this Court.[14] For these reasons, Counts One and Two must be dismissed.

C. The FTCA Exempts From Its Scope Actions Taken By an Independent Contractor.

When Congress, by enacting the FTCA, established a narrow waiver of the government's immunity from suit in tort, it limited the government's liability to torts committed by "employee(s) of the Government" while acting within the scope of their employment. 28 U.S.C. § 1346(b)(1); see United States v. Orleans, 425 U.S. 807, 813 (1976). Congress intended to permit liability based on the careless or negligent conduct of government employees, for which the United States was made liable according to state law under the doctrine of *respondeat superior*. Laird v. Nelms, 406 U.S. 797, 801 (1972). Thus, the alleged tortfeasor's status as an "employee of the Government" is a sine qua non of liability under the FTCA.[15] See Sheridan v. United States, 487 U.S. 392, 400 (1988).

Congress expressly incorporated exclusionary language into the FTCA's statutory definitions. For purposes of the sovereign immunity waiver, the term "employee of the government" is defined as:

> [O]fficers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or

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[14] To the extent that they complain about how the United States handled the "aftermath of the . . . attack," those actions are also discretionary. Panificadora, 763 F.Supp. at 1159.

[15] It is well-settled that the issue of whether a particular person is an "employee of the Government" under the FTCA is a question of federal law. See, e.g., Jones v. Hadican, 552 F.2d 249, 251 n.4 (8th Cir. 1977); Brucker v. United States, 338 F.2d 427, 428 n.2 (9th Cir. 1964); United States v. Hainline, 315 F.2d 153, 156 (10th Cir. 1963).

> permanently in the service of the United States, whether with or without compensation.

28 U.S.C. § 2671. In turn, the term "federal agency" is defined as:

> [T]he executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

Id. (emphasis added).

The leading cases on whether an individual is an "employee of the Government" are United States v. Orleans, 425 U.S. 807 (1976), and Logue v. United States, 412 U.S. 521 (1973). Logue was a wrongful death action brought by the parents of a federal prisoner who had committed suicide while confined in a county jail that had undertaken, under a contract with the Federal Bureau of Prisons, to house federal prisoners. In considering whether the United States could be held liable for the prisoner's death, the Supreme Court stressed:

> For the Government to be liable for the negligence of an employee of the Nuences County jail, he must be shown to be an "employee of the Government" as that term is used in the Federal Tort Claims Act.

412 U.S. at 527. The Court went on to state:

> Congress not only authorized the Government to make contracts such as the one here in question, but rather clearly contemplated that the day-to-day operations of the contractor's facilities were to be in the hands of the contractor....[Nuences County jail] undertakes to provide custody in accordance with the Bureau of Prisons' "rules and regulations governing the care and custody of persons committed" under the contract. These rules in turn specify standards of treatment for federal prisoners, including methods of discipline, rules for communicating with attorneys, visitation privileges, mail, medical services, and employment. But the agreement gives the United States no authority to physically supervise the conduct of the jail's employees; it reserves to the United States only "the right to enter the institution ... at reasonable hours for the purpose of inspecting the same and determining the conditions under which federal offenders are housed.

412 U.S. at 529-30 (emphasis added).[16]

The Court also rejected the argument that, even if employees of the county jail were not "employees of [a] federal agency," they nevertheless still might be regarded as "persons acting on behalf of a federal agency in an official capacity" within the meaning of 28 U.S.C. § 2671. Id. at 530. As the Court noted, "[i]f petitioners were successful in this contention, of course, an employee of the Nuences County jail would be an 'employee of the government' under Section 2671, even though he was not an 'employee' of a federal agency." Id.

Based on its reading of the legislative history and its analysis of the statute, however, the Court concluded that the "acting on behalf of" language of Section 2671 was not meant to include the employees of "contractors with the United States." As stated by the Court:

> [W]e are not persuaded that employees of a contractor with the Government, whose physical performance is not subject to governmental supervision, are to be treated as "acting on behalf of" a federal agency simply because they are performing tasks that would otherwise be performed by salaried employees of the Government. If this were to be the law, the exclusion of contractors from the definition of "Federal agency" in Section 2671 would be virtually meaningless, since it would be a rare situation indeed in which an independent contractor with the Government would be performing tasks that would not otherwise be performed by salaried Government employees.

412 U.S. at 531-32 (emphasis provided).

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[16] A contractual provision reserving to the Government the right to inspect for compliance with contract terms will not independently serve to create or support a duty in the Government to so do, because such activities do not constitute sufficient control over the contractor so as to vitiate the contractor exclusion to FTCA liability. See, e.g., Murdock v. United States, 951 F.2d 907 (8th Cir. 1991), cert. denied, 112 S.Ct. 2996 (1992) ("That the government had the right to inspect [the contractor's] work and to order that work be stopped does not translate into a finding that the bureau retained sufficient control over [the contractor's] work."); Lathers v. Penguin Industries, 687 F.2d 69, 71, 73 (5th Cir. 1982) (United States owed no legal duty to employees of government contractor notwithstanding government's safety inspection program; this was "not equivalent to the day-to-day supervision of the details of [the contractor's] production.")

Three years later, the Court amplified these pronouncements in United States v. Orleans, 425 U.S. 807 (1976), which arose out of an accident in which a child who was riding in a car was injured. At the time of the accident, the car was carrying a group of children on a recreational outing sponsored by a local community action agency, which had arranged for the use of the car and procured the services of the driver. The outing was being held as part of a low income neighborhood assistance program under the Economic Opportunity Act of 1964, 42 U.S.C. § 2781 et seq. The community action agency had been organized as a non-profit corporation under state law, but was funded entirely by the Office of Economic Opportunity ("OEO"), the federal agency that administered the Economic Opportunity Act.

In determining whether the community action agency was a "federal agency" within the meaning of 28 U.S.C. § 2671, the Court stated:

> The Tort Claims Act was never intended, and has not been construed by this Court, to reach employees or agents of all federally funded programs that confer benefits on people. The language of 28 U.S.C. Section 1346(b) is unambiguous, covering injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * * ." The Act defines Government employees to include officers and employees of "any federal agency" but excludes "any contractor with the United States." 28 U.S.C. Section 2671.

425 U.S. at 813-14 (footnotes omitted).

The determinative question, according to the Court, was "not whether the community action agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." Id. at 815. The Court went on to observe:

> Billions of dollars of federal money are spent each year on projects performed by people and institutions which contract with the Government. These contractors

> act for and are paid by the United States. They are responsible to the United States for compliance with the specifications of the contract or grant, but they are largely free to select the means of its implementation....[B]y contract, the Government may fix specific and precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with federal goals, the regulations do not convert the acts of entrepreneurs--or of state governmental bodies--into federal governmental acts.

Id. at 815-16 (emphasis added).

The Court noted that "since community action agencies receive federal funding, they must comply with extensive regulations, which include employment policies and procedures, lobbying limitations, accounting and inspection procedures, expenditure limitations, and programmatic limitations and application procedures." Id. at 817-18. Nevertheless, the Court noted, "[t]he regulations do not give OEO power to supervise the daily operation of a community action agency or a neighborhood program." Id.

The Court therefore held that the community action agency was not a "federal agency" under the FTCA and accordingly, the United States was not chargeable for the negligence of the driver. To hold otherwise, the Court concluded, would "distort[] well-established concepts of master and servant relationships and extend[] the meaning of the Federal Tort Claims Act beyond the intent of Congress." Id. at 819.

The Supreme Court's holdings in Logue and Orleans turn, in large part, on the right of the United States "to control the detailed physical performance of the contractor," Logue, 412 U.S. at 528, and on "whether [the contractor's] day-to-day operations are supervised by the Federal government." Orleans, 425 U.S. at 815.

Here, Embassy Nairobi staff delegated to UIIS all responsibility for hiring, training, and supervising the local guards. Def. Ex. 3. To the extent that Department employees assisted with

training the guards, those activities took place on foreign soil. Kelly1 Depo. at 49-50. Importantly, the local guards in Nairobi performed their duties well on the day of the bombing. Compl. ¶ 74. As they were instructed to do, they stopped the terrorists' vehicle at the Embassy's gates. Id. See also Def. Ex. 3 at 7499. Consequently, plaintiffs cannot demonstrate that the guards were employees of the United States for the purposes of establishing this Court's jurisdiction or that they acted negligently, and their claims concerning the local guards' training, actions, and supervision must be dismissed.

II. The Political Question Doctrine Precludes Review of Plaintiffs' Claims

To the extent that plaintiffs complain that the Embassy was not built and maintained as a virtual fortress, the complaint presents a nonjusticiable political question. Under the political question doctrine, courts dismiss as nonjusticiable cases that would require the Judiciary to involve itself in policy choices in areas constitutionally committed to the political branches. The political question doctrine, as part of Article III's case or controversy requirement, "is primarily a function of the separation of powers." Baker v. Carr, 369 U.S. 186, 210 (1962). "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Coleman v. Miller, 307 U.S. 433, 454-55 (1930).

The Supreme Court in Baker identified various hallmarks of a nonjusticiable controversy under the political question doctrine. 369 U.S. at 217. In his concurrence in Goldwater v. Carter, 444 U.S. 996, 998 (1979), Justice Powell summarized the Baker criteria into three inquiries: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a

coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" Any one of these characteristics may be sufficient to preclude judicial review. Aktepe v. United States, 105 F.3d 1400, 1402- 03 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998); see also Spence v. Clinton, 942 F. Supp. 32, 39 (D.D.C. 1996).

The answers to Justice Powell's questions demonstrate that plaintiffs here present a nonjusticiable political question. The Constitution squarely places responsibility for the conduct of foreign affairs on the Executive, Art. II § 2, and the power to raise and appropriate monies on the Legislature. Art, I § 8. In deciding how to construct and maintain an embassy, the Department must consult with the host country to find a suitable location and make decisions about the facility's design. These require the Executive to conduct foreign affairs – actions that are "political in nature." Goldwater, 444 U.S. at 103. Additionally, Congress expressly limits the Department's ability to spend monies for foreign buildings through the appropriations process. 22 U.S.C. § 292. Decisions about appropriation levels for any given activity or purpose are vested in Congress and are political in nature. Moreover, plaintiffs simply cannot maintain an action complaining that the Secretary did not allocate sufficient funds to Nairobi as opposed to other diplomatic facilities. Those decisions involve political determinations about foreign affairs that fall outside the realm of prudential judicial review. See Goldwater, 444 U.S. at 998.

For all these reasons, this Court should refrain from delving into issues concerning the location and security of the Nairobi Embassy that are innately political.

III. Plaintiffs Fail to State a Claim Under International Law and the Law of Constructive Trust

In an attempt to rescue a claim they made in their previous litigation, Mwani, et al. v. United States, et al., Civil Action 99-125 (CKK), plaintiffs allege that the United States violated "elemental principles of international law," the constitution of Kenya, and customary international law through the International Covenant on Civil and Political Rights. Def. Ex. 4. Compl. ¶¶ 100, 105. In Mwani, plaintiffs alleged that the United States violated the first two, but this Court dismissed that Count, holding that the plaintiffs "do not cite any legal authority for the proposition that the United States has consented to be sued for violations of the Kenyan constitution. Furthermore, the Amended Complaint forces the United States (and the Court) to guess at precisely which 'elemental principles of international law' would be at issue. November 19,1999 Memorandum Opinion at 7-8. In an apparent effort to avoid the same fate, plaintiffs assert that the United States is "responsible for carrying out its obligations under its treaties or under customary international law," Compl. ¶ 102, including "avoidance of systematic racial discrimination." Id. ¶ 103. Plaintiffs' assertions fail to state a claim under international law, and, even if such a claim existed, plaintiffs fail to establish that this Court would have jurisdiction over it.

The Court of Appeals, in Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988), held that individuals fail to state a cause of action when they allege violations of customary international law and that, without an express jurisdictional basis, District Courts cannot consider their claims. Plaintiffs in that case alleged that because the United Nations' International Court of Justice had already ruled that the United States' funding

of *Nicaraguan contras* violated customary international law, this Court could find a violation of such law, of Article 94 of the United Nations Charter, and of the Administrative Procedure Act. 859 F.2d at 932. The Court of Appeals disagreed and expressly rejected plaintiffs contention here that a finding that the United States had violated an international norm "operated domestically as if it were a part of our Constitution." Id. at 940.

Here, plaintiffs do not even specify what cause of action is created by international law under which they might be able to sue the United States. See Compl. ¶¶ 99-105. They make vague allegations that the Department impermissibly secured the Embassy "Compound" after the bombing denying Kenyans "access" to the facility and restricting their movements.[17] Compl. ¶ 77. And, they allege that the Department directed and controlled relief and medical operations. Id. ¶ 78. They can make no showing that these actions -- taken to protect and help plaintiffs and other victims– rise to the level of a violation of international norms or even that they violate the express terms of the International Convention on Civil and Political Rights.[18] See id. ¶ 104. Moreover, as this Court has already held, there is no waiver of sovereign immunity to allow a suit against the sovereign under the foreign constitutions or conventions upon which plaintiffs rely. See Mwani Memorandum Opinion at 7. Thus, plaintiffs fail to state a claim under Count Three.

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[17] Of course, plaintiffs primary contention is that the Department failed to adequately secure the Compound and did not restrict access to the building adequately *before* the bombing. See Counts One and Two. Therefore, their assertion that the United States somehow impermissibly did so after the bombing can best be described as inconsistent.

[18] While the United States is a party to the ICCPR, Congress made clear that the convention does not create a private cause of action in United States courts and that it is not self-executing. Sen. Exec. Rept. 102-23, 102d Cong., 2d Sess. at 19, 28 (1992).

Because plaintiffs fail to state claim under Counts One, Two, or Three, they also fail to state a claim under Count Four. As this Court has already held, "a constructive trust is not an independent cause of action." Mwani Memorandum Opinion at 8. Because plaintiffs still do not state "a viable cause of action," their request for a constructive trust must be denied. See Count Four.

CONCLUSION

The United States has not waived sovereign immunity with respect to plaintiffs' tort claims. As a result, this Court does not have subject matter jurisdiction over Counts One or Two. To the extent that plaintiffs complain about the United States' decision about where to locate its Kenyan embassy and how to spend appropriated monies securing that Embassy, they allege only political matters. Finally, plaintiffs fail to state a claim under international law or the law of constructive trust. For all these reasons, the complaint should be dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2002, a true and correct copy of the above and foregoing Defendants Motion to Dismiss, a memorandum in support thereof, and a proposed order were mailed, first class, postage prepaid to:

Philip M. Musolino, Esq.
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_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MERANIA M. MACHARIA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 99-3274 (CKK)**
	)	
UNITED STATES OF AMERICA.	)	
	)	
Defendant.	)	
	)	

ORDER

Upon consideration of defendant's Motion to Dismiss, the opposition thereto, and the entire record of this case, it is hereby

ORDERED that defendant's motion is GRANTED, and that this case is DISMISSED with prejudice.

Dated this _____ day of _____, 2002

_____
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

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